SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 902.

PAUL GINSBURG,

Petitioner,

against

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

1. May a party, who is expressly prohibited by an unvacated interpleader injunction of another Federal Court from prosecuting an action, take any procedural steps whatsoever in pursuit of the recovery sought in such action?

2. Does a change of venue destroy the legal effectiveness of an interpleader injunction order validly entered by a Federal Court which had jurisdiction of the parties and of the subject matter?

3. If a Federal Court learns of circumstances which would bar a party's right to prosecute or recover, does it have the discretionary power under the applicable statutes and rules to consider such circumstances regardless of the manner in which they are brought to the Court's attention?

Statutes and Rules of Federal Civil Procedure Involved.

The provisions of the statutes and Rules of Federal Civil Procedure upon which respondent relies are as follows: 28 U.S.C., Sections 1335, 1397, 2361 (interpleader statutes); 28 U.S.C., Section 1404(a) (change of venue); Rules 6(b) (enlargement of time), 8(d) (effect of failure to deny where responsive pleading is required), 12(b) (defenses to be asserted in answer if responsive pleading is required), 15(b) (amendments at trial), 55(c) (relief from default), 56(c) (summary judgment), 60(b) (errors and omissions). These provisions are set forth in the Appendix, except for Section 1404(a), which is set forth at page 7.

Statement of the Case.

This petition and the proceedings below involve petitioner's attempt to defy or circumvent a valid, existing, unvacated interpleader injunction which expressly prohibits him from prosecuting this or any other action (except the interpleader action itself) to recover interpleaded insurance policy proceeds.

The judgment of the Court of Appeals sought to be reviewed affirmed the order of the District Court below (S. D. N. Y.) denying petitioner's motion for recovery of the policy proceeds and granting respondent's motion for relief to bar further prosecution.

In claiming Supreme Court jurisdiction for alleged departures from proper judicial procedure and deprivation of constitutional rights, petitioner resurrects matters already adjudicated in earlier litigation, misinterprets the applicable substantive and procedural law and makes many unsubstantiated statements and charges. However,

respondent respectfully submits that an examination as to what has actually transpired in this litigation will furnish clear refutation of these claims.

The opinion of District Court Judge Bicks below (R. 24a-27a; 170 F. Supp. 212), adopted by the Court of Appeals (R. 28a-29a; 263 F. 2d 608), ably summarizes what he correctly terms as "multifarious proceedings" involving Paul Ginsburg and The Mutual Life Insurance Company of New York as parties in connection with the controversy as to the proceeds of life insurance policies 6149,400 and 6149,401 on the life of petitioner's brother Samuel Ginsburg, deceased.

In 1953, following the assertion of conflicting claims on behalf of petitioner in this action, and others in an Arizona action, respondent, in accordance with the remedy of Federal interpleader provided by Sections 1335, 1397 and 2361, Title 28, U. S. C.,[1] duly paid the insurance proceeds into Court, obtained its discharge and the injunction order mentioned above (R. 22a-23a).

Thus, as shown in the affidavits dated July 1, 1953 and September 18, 1953 of Arthur Kaiser, one of respondent's legal officers, who is an attorney-at-law associated with the office of the attorney for the respondent, petitioner has been enjoined and prohibited from further prosecuting this action ever since 1953 (R. 17a-23a).

These affidavits were filed with the District Court below for the purpose of showing the entry of temporary and permanent interpleader injunction orders by the United States District Court for the Western District of Pennsylvania in Civil Action No. 11521.

The first of these affidavits, filed July 1, 1953, referred to the temporary interpleader injunction order restraining

[1] Text of these provisions of statutes set forth in Appendix, pp. 1a-2a.

petitioner from prosecuting this and other actions (R. 17a-20a).

The second affidavit, filed September 18, 1953, included as an attached exhibit a certified copy of the permanent interpleader injunction order (R. 21a-23a). This order permanently enjoined and prohibited petitioner from further prosecuting this and other actions (R. 22a-23a).

This injunction order is still in full force and effect. It furnishes the basis for respondent's opposition to the relief asked for by petitioner as a part of a continuing series of acts in defiance of the injunction and as an attempted collateral attack upon it.

In reliance upon the interpleader injunction prohibiting petitioner's prosecution of this action, respondent did not answer or otherwise proceed in the action herein, except for filing the affidavits referred to above.

Pursuant to a change of venue order granted by the United States District Court for the Western District of Pennsylvania, the interpleader proceeding in which the conflicting claims of petitioner and others are to be adjudicated was transferred to the United States District Court for the District of Arizona.

Petitioner's prior attacks on the validity of this change of venue were fully and extensively litigated (125 F. Supp. 920, and 131 F. Supp. 950 (D.C., W.D. Pa.), app. dis. 228 F. 2d 881 (CA 3), cert. den. 351 U.S. 979, rehearings den. 352 U.S. 813, 355 U.S. 875, and later application den. 150 F. Supp. 344 (D.C., W.D. Pa.)).

This appeal and other proceedings in which petitioner seeks recovery in this action are in clear violation of the injunction order. They constitute an impermissible collateral attack upon it. If any attack is to be made upon the interpleader injunction, or if petitioner has any claim to the proceeds of the policies, such attack or claim must be

asserted in the interpleader action which is still pending in Arizona—not in this action.

Respondent respectfully submits that the Courts below correctly concluded that, in view of the injunction, summary judgment should be denied and further prosecution barred.

I.

Petitioner, who is under the express disability of an injunction order forbidding the prosecution of this action, is not legally entitled to proceed in any manner toward recovery.

Petitioner in his involved statement of reasons as to why he feels the interpleader injunction order is not binding on him at this time, does not, and cannot, deny that such order was entered against him. Indeed, the record contains his express admissions of its entry against him and of his prior obedience to it.[2]

Petitioner now seeks to avoid the effect of the injunction by saying that it was improperly granted (a point which cannot be considered collaterally in this action) and that it has somehow become ineffective by the change of venue of the interpleader action (an unfounded claim which is disposed of in Point II).

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[2] "Although the defendant did not proceed herein pursuant to the federal Rules of Civil Procedure, it did lodge with the Clerk of this Court a copy of an Order entered in the District Court for the Western District of Pennsylvania restraining your plaintiff herein from prosecuting this action, which Order has long since its entry become ineffective and unenforceable; * * *". (Pages 1 and 2, petitioner's affidavit of May 5, 1958 in support of motion for summary judgment, R. 20-21.)

"It is a matter of record that the said injunctive decree has always been legally objectionable; that, nevertheless, as long as it was subsisting, the plaintiff herein obeyed it, without Order of this Court; and that he did not prosecute this action until the said decree became void." (Part of Para. 5, petitioner's affidavit of May 19, 1958 in opposition to proposed order, R. 44.)

As correctly stated by Judge Bicks below in his opinion (R. 27a; 170 F. Supp. 212, at p. 214), petitioner offers only his "conclusory allegations" in support of his position.

In view of the incontestable existence of the unvacated injunction, the avenue of recovery recently sought by petitioner is clearly barred. Manifestly, he cannot now be permitted to utilize his own wrongful action in attempting to prosecute the action in contravention of a valid Court order as the foundation for any right to obtain relief against respondent in the action, whether based on "default" or on any other alleged grounds. In other words, petitioner is barred from the relief he asks herein by the fundamental principle that a party cannot be permitted to take advantage of his own wrong. (*Stearns Co.* v. *United States*, 291 U. S. 54, 61-62 (1934); *Deitrick* v. *Greaney*, 309 U. S. 190, 196, rehearing den., 309 U. S. 697 (1940); *Glus* v. *Brooklyn Eastern District Terminal*, U. S. , 79 S. Ct. 760 (April 20, 1959).)

The principle that a person may be barred from relief by his own wrongful conduct is so fundamental that Courts have repeatedly held that it need not even be pleaded because it constitutes a matter impelling the Court to intervene on its own motion to prevent the wrongdoer from profiting from his wrong rather than a matter of defense. (*Gynex Corporation* v. *Dilex Institute of F. Hygiene*, 85 F. 2d 103 (CCA 2, 1936); *Renaud Sales Co., Inc.* v. *Davis*, 104 F. 2d 683 (CCA 1, 1939); *Frank Adam Electric Co.* v. *Westinghouse Electric & Mfg. Co.*, 146 F. 2d 165 (CCA 8, 1945); *Libbey-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. 2d 814 (CCA 2, 1946), cert. den. 328 U. S. 859 (1946).)

The continued existence of the interpleader injunction order clearly bars this or any other procedural steps petitioner may attempt to take toward recovery in this action.

II.

A change of venue does not destroy the effectiveness of an interpleader injunction order or any other orders entered in an action prior to the change of venue.

Petitioner's claim is that the change of venue and other collateral proceedings somehow affected the validity of the judgment. This claim is clearly unfounded.

The change of venue was to the United States District Court in Arizona, which is the state of residence of the other persons claiming the proceeds of the policies involved. This was pursuant to Section 28 U. S. C. 1404(a), which provides that:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Recent and clear judicial confirmation of the fact that prior orders in other proceedings are not affected by a change of venue is furnished by *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955), and *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866 (CA 2, 1950).

In *Norwood* v. *Kirkpatrick*, *supra*, this Court said (p. 31):

> "And Judge Parker of the Fourth Circuit, consultant to the Advisory Committee, writing for the court in *Jiffy Lubricator Co., Inc.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362, also construed the statute as we understand it:
>
> '. . . A dismissal in application of [*forum non conveniens*] or any other principle puts an

end to the action and hence is final and appealable. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes. * * *,"

In *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, *supra*, cited by Judge Bicks below, the Court, in construing the same provision, said (p. 868) that "when an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been already done."

In view of the prior change of venue, the Pennsylvania District Court's decision of February 13, 1958 (R. 31) to the effect that that Court no longer had jurisdiction does not support petitioner's position. The validity of the interpleader injunction order was not affected by the change of venue, but became, in effect, the order of the Arizona District Court. As District Judge Gourley pointed out, "any relief to which movant might be entitled must be pursued in the United States District Court at Phoenix, Arizona." See also, Judge Bicks' statement to the same effect in his opinion below (R. 26a; 170 F. Supp. 212, at p. 214).

The change of venue involves only a change in the place of trial of the conflicting claims. All orders heretofore entered in that action, including the interpleader injunction order, remain in full force and effect.

III.

Where a Federal Court learns of circumstances which would bar the other party's right of prosecution or recovery, it has the discretionary power to consider such circumstances regardless of the manner in which they are brought to its attention.

Since petitioner's motion for a summary judgment was clearly predicated upon petitioner's default theory, the District Court below certainly had the power to declare that respondent should not be regarded as having been in default under the circumstances and to deny the motion for summary judgment because of the existence of the injunction. This conclusion is clearly correct and valid both upon the fundamental principle that petitioner cannot be permitted to take advantage of his own wrong in violating a Court order and upon the equally fundamental discretionary powers the Courts have in any event under the Federal Rules.

Petitioner, in asserting respondent has waived its right to rely on the injunction, is under a gross misconception as to the nature and effect of the Federal Rules as applied to this situation.

FIRSTLY, as shown in Point I, he cannot be permitted to utilize his own wrong. This is a subject upon which a Court can act upon its own motion whether or not any such defense has been raised.

SECONDLY, the provisions of the Rules of Federal Civil Procedure upon which petitioner relies are applicable only to situations in which a responsive pleading is "required". See Rules 8(d) and 12(b).[3] Such pleading certainly is not

[3] Text of these provisions of Rules set forth in Appendix, p. 3a.

required if the other party is under the express disability of a Federal interpleader injunction order prohibiting him from proceeding in any other action. Any other conclusion would defeat the effectiveness of the interpleader remedy by requiring useless procedural steps by the interpleading plaintiff in every action in which one of the conflicting claims has been asserted against it.[4]

THIRDLY, the claim that a party should not, or cannot, be permitted to proceed in a case due to the pendency of other related proceedings is not a matter of defense of the type referred to in these rules. It has been repeatedly held that a motion to stay an action pending the determination of another action between the same parties, or for other reasons, is not a defense of the type which is waived under the Federal Rules if not pleaded.

Butler v. *Judge of United States District Court, etc.*, 116 F. 2d 1013 (CCA 9, 1941);
Moore v. *Dunham*, 240 F. 2d 198, 200 (CA 10, 1956);
Green v. *Cravatt*, 35 F. Supp. 491 (D. C., W. D. Pa., 1940);
Parker v. *Transcontinental & Western Air, Inc.*, 8 F. R. Serv. 12e. 231, Case 16, p. 169, 4 F. R. D. 325 (U. S. D. C., W. D. Mo., 1944).

FOURTHLY, a Federal Court has broad powers under the Federal Rules, particularly Rule 6(b) (enlargement of time), Rule 15(b) (amendments at trial), Rule 55(c) (relief from default), Rule 56(c) (summary judgment) and Rule 60(b) (errors and omissions),[5] to determine whether or not the pleadings or any other facts before the Court warrant the entry of a default, summary, or any other form

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[4] See Interpleader Statutes cited at pp. 1a-2a.

[5] Text of these provisions of Rules set forth in Appendix, pp. 2a-5a.

of judgment against a party based on the claim that he is in default for failure to answer or that he has waived a particular defense by not pleading it.

The breadth of the discretionary power of a Federal Court to permit the assertion of meritorious defenses at any stage of the proceedings without regard to whether such defenses were originally pleaded is well illustrated by the decisions under these rules.

Accordingly, in *Rossiter* v. *Vogel,* 134 F. 2d 908, 912 (CCA 2, 1943), the Court reversed the District Court's grant of summary judgment on the ground that non-pleaded defenses had been waived, saying that "where facts appear in affidavits upon motion for a summary judgment which would justify an amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment."

In *United States ex rel. Laughlin* v. *Eicher,* 56 F. Supp. 972 (U. S. D. C., D. C., 1944) it was held that an affidavit in support of the defendant's motion for a summary judgment could be considered in place of an answer or a formal answer could be filed at any time, even after judgment.

In *Tillman* v. *National City Bank of New York,* 118 F. 2d 631 (CCA 2, 1941), the Court sanctioned amendment at the trial stage so as to permit the assertion of a meritorious affirmative defense not pleaded in the answer, where no surprise was claimed. Indeed, amendments permitting the addition of defenses have been permitted even after final judgment. See: *Federal Deposit Ins. Corporation* v. *Siraco,* 174 F. 2d 360, 363 (CA 2, 1949), and cases cited in that opinion; *Berrios* v. *Baetjer,* 6 F. R. Serv. 60b.24, Case 1, p. 665 (U. S. D. C. Puerto Rico, 1942).

Moreover, respondent respectfully submits that the considerations supporting respondent's right to rely on the interpleader injunction order are far stronger than were involved in the cases discussed above. As contrasted with

the situation involved in many of these decisions, this is not a case in which respondent has suddenly and belatedly asserted a contention as to which petitioner had no knowledge.

For a period of almost 5 years, during which a certified copy of the injunction prohibiting petitioner from prosecuting this action has been on file with the District Court below with petitioner's knowledge, petitioner never, until very recently, challenged the procedural regularity of the manner in which respondent sought to protect its rights. Until his recent maneuvers, petitioner at no time asserted either that he had a right to seek judgment in the action or that respondent was in any way in "default" as to the manner in which such injunction was brought to the attention of the District Court below.

Under the circumstances, petitioner cannot possibly claim surprise or prejudice. Indeed, both here and in the Courts below he has set forth strenuously and at some length his arguments as to why he thinks the injunction is not now binding upon him.

In view of the circumstances clearly showing the continued existence and validity of the interpleader injunction order, the Courts below correctly denied summary judgment and granted the relief sought by respondent to free it from further and unwarranted harassment by petitioner.

Conclusion.

The interpleader injunction order is, and at all times since its entry has been, binding upon petitioner so as to prevent him from taking this or any other steps toward recovery in this action. The validity of the interpleader injunction order has not been affected by the change of venue of the action in which it was entered and any Federal

Court has the power to recognize its existence and effect at any stage of the action regardless of the manner in which it is brought to the Court's attention.

Respondent feels that it has been indulgent in merely resisting petitioner's repeated and persistent actions in violation of the injunction order rather than seeking special relief in the interpleader action, now pending in the Arizona District Court, on the basis of its claim that petitioner has violated the interpleader injunction order. However, respondent does not wish to have its indulgence misconstrued as an admission that it has no right to such relief for petitioner's actions.

In any event, since it is clear that petitioner's attempted proceedings toward recovery in this action are in violation of a Court order prohibiting such prosecution, and that the proceedings and the conclusions of the Courts below were correct and in accordance with due process and proper judicial procedure, certiorari should be denied.

Respectfully submitted,

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June, 1959.

Appendix.

Interpleader Statutes Upon Which Respondent Relies.

28 U. S. C., Sec. 1335:

"*Interpleader*

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

28 U. S. C. Sec. 1397:

"*Interpleader*

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside."

28 U. S. C. Sec. 2361:

"*Process and procedure*

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."

Provisions of Federal Rules of Civil Procedure Upon Which Respondent Relies.

Rule 6(b):

"*Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expira-

tion of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

Rule 8(d) (pleadings—failure to deny):

"*Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

Rule 12(b) (presenting defenses and objections):

"*How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, * * *."

Rule 15(b):

"*Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be

amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Rule 55(c):

"*Setting Aside Default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Rule 56(c) (motion and proceedings on summary judgment):

"*Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 60(b) (relief from judgment for mistakes, etc.):

"*Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence

could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., §1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."